United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

76-1033

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1033

UNITED STATES OF AMERICA,
Appellee,

—v.—

RAYMOND ROBIN,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION OF THE UNITED STATES OF AMERICA FOR REHEARING

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

FREDERICK T. DAVIS,
Assistant United States Attorney, Of Counsel.

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Preliminary Statement

The United States of America respectfully petitions for rehearing of the decision of the Court, Docket No. 76-1033, filed on October 15, 1976, vacating the sentence of the appellant Raymond Robin and remanding for resentencing.

Statement of the Case

On June 20, 1974, Indictment 74 Cr. 622 was filed in three counts charging Raymond Robin and others with violations of the federal narcotics laws. On November 25, 1975, Robin pleaded guilty to all three counts before the Honorable Constance Baker Motley, following a lengthy discussion concerning the Government's power to

procure an order of *nolle prosequi* of the indictment. On January 9, 1976, after a sentencing hearing of several hours length, Robin was sentenced to terms of fifteen years in prison and a $25,000 fine on each of the three counts, the prison terms on Counts One and Two to run concurrently with each other and consecutively to the sentence on Count Three, to be followed by a special parole term of three years.

Robin appealed to this Court urging that the sentence be vacated and remanded for a new sentence. Among the reasons claimed to require the new sentence was the alleged "impartiality" of the Government on the issue of sentence; the impropriety of several matters claimed to have been considered by the District Court; and the failure of the District Court to consider the "effect of the sentence on appellant's health and family." No claim whatsoever was made in Robin's brief that the pre-sentence report contained factually insufficient or misleading information, or that Robin had had insufficient time to consider the pre-sentence report. Indeed, at oral argument counsel for Robin, when asked by a member of this Court whether the Government should have been allowed to present its arguments to the District Court, claimed that the relief he was seeking was to force the Government to make its presentations through the pre-sentence report rather than directly to the District Court itself.

In reversing the sentence, the majority of the panel of this Court did not adopt or even rule on any of the arguments advanced by Robin. While noting the "particular severity" of the sentence (slip op. at 5841), the majority based its conclusion solely upon the claimed fact —presented to this Court for the first and only time in affidavit of Robin's trial attorney filed *after* the filing of briefs in this case—that Robin had had insufficient time

to review the pre-sentence report. Slip op. 5839. The majority thus vacated the sentence and remanded to a different judge for resentencing.

Judge Timbers, in dissent, noted that 1) Robin never made an objection in the District Court that he had not had sufficient time to read the pre-sentence report; 2) the report was in fact, available to Robin's attorney; 3) the report was used extensively by Robin's attorney during the lengthy sentencing hearing; 4) Judge Motley ruled that she would not consider matters set forth in the pre-sentence report other than to crimes to which he pleaded guilty; and 5) Robin had never raised the issue upon which the majority reversed the sentence in his briefs or in oral argument.

Reasons for this Petition

The Government respectfully suggests that this panel should rehear this case for two reasons.

First, the majority seriously misstates the facts of the case, and relies for its reversal upon erroneous facts improperly presented to the Court.

Second, in reversing the sentence of the District Court upon a ground that was not even raised by the appellant in the District Court, the majority has, while formally noting that "we cannot entertain a serious question as to [the] legality" of the sentence, slip op. at 5841, created a capricious precedent that casts into doubt the validity of current sentencing practices in the Southern District of New York.

ARGUMENT

POINT I

The majority relied upon erroneous facts not properly presented to either the District Court or this Court.

In reaching its conclusion that the sentencing procedure used in this case was improper, the majority resolved key factual issues in favor of Robin even though many of those conclusions were squarely refuted in the record and in any event were never properly presented to either this Court or the District Court.

The majority's reversal was based in principal part on its determination that Robin had insufficient time to rebut the factual allegations made in the presentence report. Slip op. 5838. The record shows that the factual statements made in the pre-sentence report were fully familiar to Robin long before the day of sentence, and that he had every opportunity to rebut them. First, the Government's view about the nature of Robin's complicity in the narcotics business was made crystal clear to Robin at the time of his guilty plea on November 25, 1975, roughly six weeks prior to the sentence. At that time the Assistant United States Attorney in charge of the case opposed Robin's efforts to plead guilty to the federal indictment on the ground, *inter alia*, that his proposed allocution drastically and fraudulently understated his actual involvement. Included in the Assistant's statements to the Court were descriptions of the precise facts underlying the Government's view of what the Government would have proved had there been a trial (Tr. 11/25/75 (A.M.), pp. 20, 44, 47, 49; (P.M.), pp. 27, 30, 31, 38).

Thereafter, a letter dated December 9, 1975, was sent to Judge Motley and to Robin's counsel from Assistant District Attorney Cunningham, the state prosecutor principally in charge of the investigation into Robin's narcotics activities.* This letter set out in detail the Government's version of the facts underlying Robin's narcotics activities. While Robin's lawyer claimed in *this* Court—in an affidavit filed after the briefs had been filed by both parties—that he did not receive the letter until a few days prior to the sentence, he did so in a remarkably vague, imprecise and unconvincing fashion.** Furthermore, given other incorrect statements in the same affidavit, to be discussed below, we submit that this eleventh-hour presentation of a fact never aired in the District Court merited at least the opportunity for an exploration in the District Court before reliance by this Court.*** Finally, the record is devoid of any indication that at the time of sentence the Cunningham letter had been recently received.

Further, the record is at best obscure as to when the pre-sentence report itself became available to Robin, and when he availed himself of the opportunity to see it. While the attorney's last-minute affidavit indicates that he only saw it on the day of sentence, he does not even claim that it was not available to him prior to that time.

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* The text of the letter itself indicates that a carbon copy was sent to Robin's attorney. (Brief at 19a).

** In particular, while he admitted that he had no date stamp, he stated that his "recollection" was that the letter did not arrive until after December 26, 1975. Affidavit, p. 1.

*** Robin's trial attorney's description of his attempt to procure a postponement of the sentence is similarly obscure, if not misleading. While in paragraph 3 he stated that on January 6th or 7th, 1976, he "went to see Judge Motley for the purpose of requesting an adjournment," in paragraph 5 he stated "the fact remains that I had not applied to the law clerk for adjournment of sentence."

Furthermore, the claim in the affidavit that he did not get a chance to see it until 11:00 A.M., in chambers, on the day of sentence is belied by the fact that the sentencing proceeding began, in court, at 10:00 A.M., as both the record of the case (Tr. 1/9/76, p. 1) and this Court's opinion, slip op. at 5831, indicate.

Finally, the record of the sentencing hearing shows that Robin's attorney not only failed to challenge the accuracy of the pre-sentence report or to request time to rebut it, but referred to the report in the very first moments of the lengthy sentencing hearing (Tr. 2) and at frequent intervals thereafter (Tr. 4, 8, 11). Indeed, at no time in *any* of the proceedings in the District Court did Robin ever make an explicit offer of proof concerning the scope of his activities, or request a hearing on the Government's claims,* other than an offer to show the District Judge a short segment of a transcript of statements by state prosecutors about Robin's activities that was made before even they knew the full extent of those activities.**

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* While the majority refers to "alleged information" provided to the Government, slip op. at 5838, the Government specifically noted the source of its information concerning Robin's activities, pointing out that Anthony Verzino, Mario Perna and another witness had provided detailed information concerning Robin. Verzino and Perna had, at the time of the sentencing of Robin, testified for the Government in the trial of *United States* v. *Magnano* et al., in which the defendants, with one exception, had been convicted on the basis of their testimony. The transcript of that trial even reveals some of the details of Robin's involvement, although since he was not on trial his full involvement was not explored. The *Magnano* convictions were affirmed by this Court. Dkt. No. 76-1402, slip op. 5679 (2d Cir., September 7, 1976).

At the sentencing hearing—as well as at the time of the guilty plea—the Government made known the identities and background of these individuals, and noted that their testimony was corroborated by tapes and other evidence.

** This short segment was included in an appendix to Robin's original brief in this appeal (Brief at 20a).

While the majority notes that the District Court did not formally admit this transcript into evidence, the record is clear that its content was made known.

Thus, the record clearly shows that the majority's conclusion that "appellant was severely impaired at sentencing by inadequate preparation that was wholly beyond his control" is incorrect. To the extent that the majority resolved numerous factual issues against the Government—such as the date of Robin's receipt of the Cunningham letter, the availability of the pre-sentence report both before and on the day of sentence, and the refusal of the District Court to adjourn the sentence to allow Robin to rebut the Cunningham letter—the panel should at the least modify its opinion to allow the Government and the District Court to establish the true facts before vacating the judgment and remanding for a new sentence.* The reversal of the sentence without allowing for an exploration of these facts constitutes, we submit, not only unfair treatment of the Government but an indignity to the sentencing court.

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* The majority notes in its opinion that certain factual claims by the appellant were not "denied" by the Government. (See footnotes 3, 5 and 30). Many of the claims were not "denied" for the simple reason that they were never raised in Robin's brief, and were even then not relevant to an issue that he was raising. Others (such as whether the District Court denied a request to adjourn the sentence) simply could not be "denied" without holding a hearing to determine what the true facts were—an impossibility in the present situation since no claim was ever made in the District Court.

POINT II

The majority's decision creates a capricious and burdensome precedent that is utterly without basis in the law.

In Point I we have submitted our view that the panel's resolution of certain factual issues in the sentencing procedures was completely without basis in the record in the case and contrary to fact. We submit, in addition, that the majority's decision creates a precedent that will unnecessarily burden the District Court and this Court with procedural claims concerning sentence review without improving the quality of justice or diminishing "substantial disparities in sentences", slip op. at 5841, in the least.

While Robin attacked the position taken by the Government in this case as well as the procedures adopted by the District Court, this Court did not rule on any of the issues raised in his appeal. Indeed, the law is clear that a "prosecutor has a duty to reveal matters to the court which are relevant to proper sentence whether or not favorable to the defendant," *United States* v. *Pfingst*, 477 F.2d 177, 191 (2d Cir. 1973), and similarly that the sentencing "judge may appropriately conduct an injury broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). Rather than quarreling with any of these or the other precedents cited in the Government's brief, the panel held, in essence, that in any case where a high sentence is imposed and where the defendant claims on appeal—even for the first time—that he did not have enough time to see the pre-sentence report, the sentence will be vacated, and a new judge assigned.

It should be noted that the procedures adopted by both the Government and the District Court in this case were standard procedures followed in the Southern District of New York. The Government, following the requirements of *United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), made its sentencing position and its factual allegations known to the defendant well before the day of sentence. Similarly, the District Court allowed Robin far more than the "verbal explanation or comment" required by the *Rosner* decision, *id.* at 1230. Finally, while the majority held that Robin had insufficient time to see the pre-sentence report, the record is entirely silent as to whether the report was available to him prior to the day of sentence, and only the affidavit of his attorney filed at the last minute in this Court asserts—in the unconvincing fashion described above—that his access to the report was anything other than complete. When coupled with the fact that Robin made full use of the pre-sentence report in the sentencing procedure, never asked for time to rebut it, and indeed in oral argument, far from seeking to rebut the pre-sentence report, actually requested that the Government's allegations had been included in it, it is clear that the procedures used here vary only in minor detail from those in numerous cases in this District.*

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* For example, while statistics of such events do not appear to be kept, experience has shown that in many if not most cases defense attorneys do not look at pre-sentence reports until the day of sentence, even if they are available well before. Under the ruling of this panel in such an event a defendant would be entitled to automatic reversal of his sentence if the report should contain a disputed factual averment, even if absolutely no claim was made in the District Court.

It follows, then, that the majority has created a new, utterly unprecedented rule* that is burdensome—both to District Court, which will be required either to anticipate later claims of surprise or hold hearings in the event a factual issue is developed, even in the absence of a request for one and to this Court, which will be inundated with numerous claims of procedural irregularity similarly without basis in the record—and capricious. We submit that by far the better practice would be to modify the panel's opinion either to affirm the judgment of conviction, or at a minimum to remand to Judge Motley for a factual determination upon which a proper record can be made.

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* The principal decision cited by the Court in support of its new procedural rule is *United States* v. *Rosner, supra,* which the majority notes presented "much the same" situation as this case. Slip op. at 5838. *Rosner,* however, involved the submission of entirely new allegations by the Government on the day of sentence, without allowing the defendant any opportunity for "verbal explanation or comment." Here, in contrast, the Government had made its position clear in the December 9, 1975, letter from Cunningham as well as at the time of the guilty plea on November 25, 1975, and Robin not only had but vociferously exercised the opportunity to explain and comment.

CONCLUSION

The judgment of conviction should be affirmed, or in the alternative the opinion of the panel should be modified as indicated herein.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

FREDERICK T. DAVIS,
Assistant United States Attorney,
Of Counsel.

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AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

Frederick T. Davis being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 29 day of Nov 1976 he served ~~a copy~~ two copies of the within [illegible] by placing the same in a properly postpaid franked envelope addressed:

Robert I. Stern
277 Broadway
New York NY 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Frederick T. Davis

Sworn to before me this

30 day of Nov 1976

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978